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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 560

SILVIO A. LANZA and VITO F. LANZA,
Appellants,

vs.

STATE OF NEW JERSEY, BY SALVATORE A. BONTEMPO, Commissioner of Conservation and Economic Development,
Appellee.

On Appeal from New Jersey Supreme Court

JURISDICTIONAL STATEMENT

JACOB GREEN,
Counsel for Appellants,
11 Commerce Street,
Newark 2, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
JURISDICTIONAL STATEMENT	1
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	5
STATEMENT OF THE CASE	5
HOW THE FEDERAL QUESTION IS PRESENTED	8
THE QUESTIONS ARE SUBSTANTIAL	9
CONCLUSION	17
APPENDIX:	
A—Mandate on Affirmance of Supreme Court of New Jersey	1a
B—Opinion of Supreme Court of New Jersey (190 A. 2d 374)	2a
C—Opinion of the Superior Court of New Jersey, Appellate Division	8a
D—Round Valley Act and Amendments	24a
E—Various Constitutional Provisions	34a

Cases Cited

Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1896) ... 10

City of Newark v. Padula, 24 N. J. Super. 483, 94 A. 2d 859 (Ch. Div., 1953), affirmed, 26 N. J. Super. 251, 97 A. 2d 735 (App. Div., 1953) 11, 12

PAGE

Coombs v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1931) 10, 11

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 3

Davis v. Wechsler, 263 U. S. 22 15

Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773 (1913) 11

Fidelity Union Trust Co. v. Price, 18 N. J. Super. 578, 87 A. 2d 565 (Ch., 1952), affirmed in part and reversed in part on other grounds, 11 N. J. 90, 93 A. 2d 321 (1952) 10

Grays Harbor Logging Co. v. Coats-Fordney Co., 243 U. S. 251 16

Henderson v. Weber, 131 N. J. L. 299, 35 A. 2d 609 (E. & A., 1944) 12

Lathrop v. Donohue, 367 U. S. 820 3

Louisville and Nashville R. Co. v. Higdon, 234 U. S. 592 8

Maxwell v. Goetschius, 40 N. J. L. 383 (Sup. Ct., 1878) 10

Miller v. McKenna, 23 Cal. 2d 840, 147 P. 2d 531 (Sup. Ct., 1944) 11

Moore v. State, 43 N. J. L. 203 (E. & A., 1881) 12

Morris v. Comptroller, 54 N. J. L. 268, 23 Atl. 664 (Sup. Ct., 1892) 12

N.A.A.C.P. v. Alabama, 357 U. S. 449 15

Norfolk v. Stephenson, 185 Va. 305, 38 S. E. 2d 570 (Sup. Ct., 1946) 11

O'Neill v. Freeholders of Hudson, 41 N. J. L. 161 (E. & A., 1879) 10

PAGE

Pennsylvania Greyhound, Inc. v. Rosenthal, 14 N. J. 372, 102 A. 2d 587 (1954) 10

Plahn v. Gibernaud, 85 N. J. Eq. 143, 96 A. 40 (E. & A., 1915) 12

Port of N. Y. Authority v. Heming, 34 N. J. 144, 167 A. 2d 609 (1961) 12

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1943) 13

Roberts v. Anderson, 66 F. 2d 874 (C. C. A 10th Cir., 1933) 13

State v. Lanza, 27 N. J. 516, 143 A. 2d 57 (1958) 15

State by Parsons v. Standard Oil Co., 5 N. J. 281, 74 A. 2d 565 (1950), aff'd, 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 1078 (1950) 11, 12

Theresa Grotta Home v. Board of Adjustment, 19 N. J. Super. 331, 88 A. 2d 355 (App. Div., 1952) 12

Vreeland v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052 (Sup. Ct., 1891) 11

Williams v. Bruffy, 96 U. S. 176 3

United States Constitution Cited

Fifth Amendment 3, 5, 8

Fourteenth Amendment 3-5, 8, 12, 14, 17

Article I, Section 10 ..... 3, 5, 12

New Jersey Constitution Cited

1947—

Article VII, Section II, Paragraph 3 3

Paragraph 2 4

Article VIII, Section II, Paragraphs 2, 3 .... 5, 16

PAGE

Statutes Cited

Eminent Domain Act 9
L. 1956, c. 60, Sec. 1 .....2-5, 9
L. 1957, c. 215 ..... 2, 5
L. 1958, c. 57 .....2, 3, 5
N.J.S.A. 58:20-1 .....2-5, 9
N.J.S.A. 20:1-30 10
N.J.S.A. 58:20-1 2
Round Valley Act 2-9, 11, 15, 16
28 U. S. C.:
Secs. 1257(2), 1257(3) 2

Rules Cited

R.R. 4:37-1, 3, 4 8
R.R. 4:37-1(b) 12

Texts Cited

18 Am. Jur., Eminent Domain:
864, Sec. 231 12

II Sutherland, Statutory Construction (1943):
Sec. 2206 11

IN THE

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OCTOBER TERM, 1963

No.

SILVIO A. LANZA and VITO F. LANZA,

Appellants,

vs.

STATE OF NEW JERSEY, by SALVATORE A. BONTEMPO, Commissioner of Conservation and Economic Development,

Appellee.

On Appeal from the New Jersey Supreme Court

Jurisdictional Statement

Appellants appeal from the final judgment of the New Jersey Supreme Court entered on April 23, 1963, a copy of which is annexed hereto as Appendix A, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial statement is presented.

Opinion Below

The opinion of the Supreme Court of New Jersey is reported at 39 N. J. 595, 190 A. 2d 374. Copy of the opinion is annexed hereto as Appendix B. The opinion of the New

Jersey Supreme Court is substantially an affirmance based upon the opinion of the court below, namely the Appellate Division of the Superior Court of New Jersey, the opinion of which is reported in 74 N. J. Super. 362, 181 A. 2d 390. A copy of the opinion of the Appellate Division of the Superior Court of New Jersey is annexed hereto as Appendix C. Additional opinions in the cause are reported in 27 N. J. 516, 143 A. 2d 571, appealed dismissed 358 U. S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959), rehearing denied 359 U. S. 932, 79 S. Ct. 606, 3 L. Ed. 2d 634 (1959); 48 N. J. Super. 362, 137 A. 2d 622 (Law Div. N. J. Super. Ct. 1957); 60 N. J. Super. 130, 158 A. 2d 351, and 60 N. J. Super. 139, 158 A. 2d 355 (App. Div. N. J. Super. Ct. 1959).

Jurisdiction

This action was brought by the State of New Jersey to condemn certain lands in Round Valley, Hunterdon County, New Jersey, belonging to the appellant, Silvio A. Lanza. The action was brought by the Commissioner of Conservation and Economic Development of the State of New Jersey, pursuant to the authority granted to him by the special act known as the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.*; the referred to Act was amended by L. 1957, c. 215; L. 1958, c. 57. In June 1958, the appellant, Vito F. Lanza acquired an undivided 1/10th interest in the subject premises and sought to intervene in the pending action. The final judgment of the New Jersey Supreme Court was entered on April 23, 1963. An order denying a timely made petition for rehearing was entered May 27, 1963. Notice of Appeal was filed in the Supreme Court of New Jersey on July 19, 1963. The jurisdiction of the United States Supreme Court to review this judgment is conferred by Title 28, United States Code, Sections 1257(2) and 1257(3). The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment

in this case: *Lathrop* v. *Donohue*, 367 U. S. 820; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Williams* v. *Bruffy*, 96 U. S. 176.

Questions Presented

1. Is the *Round Valley Act*, L. 1956, c. 60; L. 1958, c. 57; N.J.S.A. 58:20-1 *et seq.* invalid as applied by the Courts of the State of New Jersey as being repugnant to the restrictions of Art. I, Sec. 10 and the due process and equal protection provisions of Amendments V and XIV of the United States Constitution, in that the Act has been held to operate retroactively so as to permit the State to acquire the property of the appellants?

2. Did the adverse determination on the law and facts made in the proceedings in the Courts of the State of New Jersey deprive the appellants of thir rights under Art. I, Sec. 10 and the due process and equal protection provisions of Amendments V and XIV of the United States Constitution?

3. Does the determination by the New Jersey Supreme Court that the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 50:20-1 *et seq.* does not create a debt or liability of the State of New Jersey to certain municipalities and counties, as would require submission of the questions to voters as required by the New Jersey Constitution, 1947, Art. VII, Sec. II, par. 3, render the Act invalid as operating to deprive the appellants of their property without due process of law, and denying them the equal protection of law in contravention of the provisions of Amendment XIV of the United States Constitution?

4. Does the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.* operate to deprive the appellants of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States

Constitution, in that the Act contains an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development?

5. Does the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.* operate to deprive the appellants of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution, in that the Governor of the State of New Jersey did not certify as required by the Constitution of New Jersey, 1947, Art. VII, Sec. II, par. 2 that there were sufficient funds on hand and anticipated for the appropriation provided in the Act?

6. Did the refusal to permit intervention by a person entitled as of right thereto, and further denial of his right to be heard and to be represented by counsel of his choice, constitute a deprivation of property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution?

7. Is the determination of the trial court, as affirmed, as to valuation of nursery stock, so inadequate to the extent of being confiscatory and so against the weight of the credible evidence as to constitute a deprivation of property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution?

8. Were the appellants deprived of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution during the trial of the action by the following:

(a) The refusal of the trial court to require the State to present its case first under the special facts present in this case;

(b) The action of the trial judge *sua sponte* of appointing an individual as an impartial expert, where no court rule or statute provides for such action;

(c) The refusal of the trial court to reopen the case for the taking of additional testimony in the light of the unusual facts presented in this case and the use of an unusual method for valuation of the land and buildings;

(d) The employment of special counsel to prosecute this action on behalf of the respondent.

Statutes Involved

The *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.*, amended by L. 1957, c. 215 and by L. 1958, c. 57, is set forth in Appendix D annexed hereto.

The constitutional provisions involved are Art. I, Sec. 10, Amendments V and XIV of the United States Constitution, and Art. VIII, Sec. II, Pars. 2 and 3 of the New Jersey Constitution, 1947, which constitutional provisions are printed in Appendix E annexed hereto.

Statement of the Case

In July 1957, the appellant, Silvio A. Lanza, hereinafter referred to as Silvio, was the owner of a substantial tract of land in Hunterdon County, New Jersey. The premises consisted of farm acreage in which he had planted, over a period of years, a substantial quantity of nursery stock. It also contained several buildings including the residence, a substantial sized pond, and woodlands in the rear of the property. Silvio made a systematic plan of planting, in order that he could have available for sale in the year 1958 and thereafter 15,000 Christmas trees annually, the sale of which would produce for him substantial recurring income.

In July 1957 the then Commissioner of Conservation and Economic Development, Joseph McLean, filed a complaint in the New Jersey Superior Court, Law Division, seeking to acquire by condemnation proceedings the property owned by Silvio. Silvio raised various defenses by answer concerning the validity of the *Round Valley Act*, pursuant to which the condemnation proceeding was brought. The trial court entered judgment affirming the validity of the statute, and Silvio appealed the decision to the New Jersey appellate courts. Pending the referred to appeal, and pursuant to the state procedure, condemnation commissioners were appointed, and after a hearing at which Silvio was present but did not give affirmative evidence, an award of $38,425.00 was made. Silvio took steps under New Jersey law to appeal the award, and the matter was set down for a non-jury trial which commenced October 30, 1958. On June 28, 1958, prior to the aforementioned trial, the New Jersey Supreme Court held that the *Round Valley Act* was valid and constitutional.

By the terms of the *Round Valley Act*, as originally enacted, the Commissioner of Conservation and Economic Development was authorized to acquire all the property to be used in the so-called Round Valley acquisition within 2 years of the effective date of the Act, or by May 31, 1958. Thereafter, while the court proceedings were pending the power to acquire expired by the very terms of the act which had granted that power. An amendment to the *Round Valley Act* was passed May 19, 1958, but was not signed by the Governor of New Jersey until June 12, 1958, on which date it became effective under New Jersey law. The amendment gave the commissioner the power to acquire properties in Round Valley by December 31, 1958.

Vito Lanza acquired a 1/10th interest as tenant in common in the property owned by Silvio Lanza by deed dated June 24, 1958. Vito moved immediately thereafter to inter-

vene in the cause. The State moved to strike Vito's intervention and Vito contested the State's application. At the hearing on the motion Vito argued that the authority of the Commissioner to continue the condemnation proceedings had expired under the original *Round Valley Act* and that the amendment purporting to grant condemnation power until December 31, 1958 was ineffective and unconstitutional. The judge hearing the motion denied Vito's motion to intervene, both as a matter of right and as a matter of discretion. The trial judge, after hearing proofs adduced at the trial concerning the value of the land and the buildings thereon, and also the nursery stock which Silvio had planted for eventual sale, determined that the value of the premises was $55,648.70, but that the value of the nursery stock was only $1,975.50. Silvio contended that the value of the nursery stock alone was $304,000.00, and an expert who testified for Silvio produced an appraisal delineating the specie, height and value of each tree counted by him, and testified that the total value of all of the trees was $259,728.90. After the trial and the rendering of the opinion by the trial judge, motion was made for a new trial pursuant to New Jersey Court Rules, and the motion was denied.

Silvio and Vito then appealed the decision to the Appellate Division of the New Jersey Superior Court, which court affirmed the determination and findings of the trial judge, and which held that Vito should have been admitted as an intervening defendant on his application made in June 1958, but that the failure to admit him did not constitute prejudicial error such as to justify a reversal.

Silvio and Vito then appealed to the New Jersey Supreme Court, which affirmed on the opinion of the Appellate Division with the sole exception as to the intervention of Vito Lanza: the Supreme Court held that it was not satisfied that the failure to permit Vito Lanza to intervene was not prejudicial as a denial of his constitutional right to par-

ticipate directly in the protection of his right as a 1/10th owner of the premises. The Supreme Court of New Jersey found instead that "the record presented does not establish Vito's claimed right to intervene, under the applicable practice rules, R.R. 4:37-1, 3, 4, with sufficient clarity to warrant a finding that the trial court either erred as a strict matter of law or abused its discretion in denying the motion".

How the Federal Question is Presented

The decision of the Appellate Division of the New Jersey Superior Court clearly holds that the statute in question is not invalid as applied by reason of repugnancy to the Federal Constitution. This aspect was expressly affirmed by the New Jersey Supreme Court on the basis of the opinion of the Appellate Division. The federal questions concerning the purported invalidity of the amendment to the Round Valley Act by reason of repugnancy to Amendments V and XIV of the United States Constitution have thus been adversely decided by the highest state court. See *Louisville and Nashville R. Co.* v. *Higdon*, 234 U. S. 592, 598. The appellants raised their federal constitutional rights regularly, consistently and continually at various stages in the proceedings below. This was done before trial pursuant to oral motion made by Silvio Lanza's attorney to dismiss the action and at the same time Vito Lanza moved orally to intervene, advancing and raising the same federal constitutional questions, as well as his personal deprivation of rights under amendment XIV of the United States Constitution. Both motions were denied by the trial judge who was of the erroneous opinion that all of the questions, including federal constitutional questions, had been passed on adversely to the appellants by the New Jersey Supreme Court and were, therefore, *res judicata*. After the trial, at the hearing of motion for new trial, the appellants again raised the federal constitutional objections concern-

ing the validity of the *Round Valley Act* and the amendment purporting to extend the time for the condemnation by the commissioner and to the proceedings which had taken place under the original act as amended. The federal questions were expressly raised and discussed in the briefs of the appellants filed in the Appellate Division of the New Jersey Superior Court and in the New Jersey Supreme Court, and also at oral argument. The questions were also expressly set forth in the appellants' petition for rehearing filed in the New Jersey Supreme Court after the rendering of its opinion, which petition was denied.

The Questions are Substantial

1. The original *Round Valley Act* (L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.*) authorized and directed the Commissioner of Conservation and Economic Development to acquire land in the Round Valley area of Hunterdon County within 2 years from the effective date of the Act, which was June 1, 1956. This land was to be acquired by purchase or by exercise of eminent domain under the *Eminent Domain Act*, N.J.S.A. 20:1-1 *et seq.* Pursuant to these Acts, in July, 1957, an action was begun to acquire the appellants' lands. On May 31, 1958, 2 years after the effective date of the Act, the Commissioner had not yet acquired the appellants' property. Under New Jersey law, title was still in the appellant, Silvio A. Lanza, as there had been neither payment of the award to him or into court.

On June 1, 1958, upon expiration of the grant of authority to condemn in the *Round Valley Act*, L. 1956, c. 60, § 1, certain rights became vested in Silvio Lanza which the amendment of June 12, 1958, if it operates retroactively, would destroy. One of these is the right to the enjoyment of his property free from the condemnation proceedings, a right which has been declared second in degree to that of personal liberty, and which is clearly a vested right. *Chi-*

cago, Burlington & Quincy Railroad v. *Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1896); *Fidelity Union Trust Co.* v. *Price*, 18 N. J. Super. 578, 87 A. 2d 565 (Ch. 1952), affirmed in part and reversed in part on other grounds 11 N. J. 90, 93 A. 2d 321 (1952).

The Commissioner could have abandoned these condemnation proceedings at any time before the State acquired title, by tendering only the costs involved. N.J.S.A. 20:1-30; *O'Neill* v. *Freeholders of Hudson*, 41 N. J. L. 161 (E. & A. 1879). If this were done on June 1, 1958, the interest of Silvio in his property would certainly have been considered a "vested" right, one protected from "arbitrary state action". *Pennsylvania Greyhound, Inc.* v. *Rosenthal*, 14 N. J. 372, 102 A. 2d 587 (1954). Here, the Commissioner failed to acquire Silvio's property within the time limited by the statute, and on June 1, 1958 his authority to do so had expired. The two situations are comparable; and the essential point is that in both the authority to condemn has terminated, the only difference being in the manner of termination. The New Jersey courts apparently felt that the nature of Silvio's right was something less than vested; but if Silvio has no vested right at the time the authority to condemn has terminated without acquisition by the Commissioner, when will he ever have a vested right? One wonders whether the same result would have been reached if the amendment had been passed five months after the original termination date; or a year or two later. Under the court's view, apparently, so long as the original steps were within the prescribed procedures, the legislature may at any time validly extend the period of acquisition.

It is hornbook law that the legislature cannot by a statute divest vested property rights by validating past acts and proceedings. *Pennsylvania Greyhound Lines* v. *Rosenthal*, *supra*; *Maxwell* v. *Goetschius*, 40 N. J. L. 383 (Sup. Ct. 1878); *Coombs* v. *Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L.

Ed. 866 (1931); *Ettor* v. *Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773 (1913); *Norfolk* v. *Stephenson*, 185 Va. 305, 38 S. E. 2d 570 (Sup. Ct. 1946); *Miller* v. *McKenna*, 23 Cal. 2d 840, 147 P. 2d 531 (Sup. Ct. 1944); II *Sutherland, Statutory Construction* (1943) §2206. Here, the statute involved is one concerning the rights and powers of condemnation and the sovereign is under a further admonition to proceed strictly in accordance with the statutory grant of authority. *Vreeland* v. *Jersey City*, 54 N. J. L. 49, 22 Atl. 1052 (Sup. Ct. 1891). Thus, the amendment in question, if it operates retroactively, would have to be interpreted as validating all the proceedings begun under the original *Round Valley Act*, including the filing of the complaint, appointment of the commissioners, and the holding of hearings, and, by legislative prescript, as declaring that they shall all be deemed to have been done pursuant to authority granted in the June 12, 1958 Act. Thus viewed, the amendment has the effect of taking Silvio's estate vested as of June 1, 1958 and converting it into money as of July 3, 1957. This would not only impair Silvio's vested right to deal with his property, but it would deprive the appellants of any appreciation in the value of their property or of any increase in the value of the nursery stock subsequent to July 3, 1957.

Further, after May 31, 1958 Silvio and Vito were properly entitled to believe that Silvio's lands could no longer validly be taken under the pending proceedings. The deed to Vito in June 1958 vested in him an undivided 1 10th interest in the property. To take Vito's property by validating the proceedings instituted before his acquisition, in which proceedings he did not participate, would violate the constitutional requirements of due process, and would impair the obligation of contract as represented by his deed. *State by Parsons* v. *Standard Oil Co.*, 5 N. J. 281, 74 A. 2d 565 (1950); *City of Newark* v. *Padula*, 24 N. J. Super. 483,

94 A. 2d 859 (Ch. Div. 1953), affirmed, 26 N. J. Super. 251, 97 A. 2d 735 (App. Div. 1953); U. S. Const., Art. I, Sec. 10.

Furthermore, on June 1, 1958, Silvio acquired the right to invoke the defense that the statutory limitation upon the Commissioner's power to condemn had run. In the analogous situation concerning general statutes of limitation, the courts of New Jersey have uniformly declared that this right to interpose the bar of a statute of limitations is a vested property right which a law making body may not abrogate or impair. *State by Parsons* v. *Standard Oil Co.*, 5 N. J. 281, 74 A. 2d 565 (1950), affirmed 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 1078 (1950). See also to the same effect, *Henderson* v. *Weber*, 131 N. J. L. 299, 35 A. 2d 609 (E. & A. 1944); *Plahn* v. *Gibernaud*, 85 N. J. Eq. 143, 96 A. 40 (E. & A. 1915); *Moore* v. *State*, 43 N. J. L. 203 (E. & A. 1881); *Theresa Grotta Home* v. *Board of Adjustment*, 19 N. J. Super. 331, 88 A. 2d 355 (App. Div. 1952).

It is submitted that interpreting the amendment as having retroactive effect so as to sustain the action taken during the 2 years before the effective date of the amendment, deprives the appellants of their property without due process of law, in contravention of *U. S. Const.*, Amend. XIV, and impairs the obligation of their contract in contravention of *U. S. Const.*, Art. I, Sec. 10.

2. Vito Lanza clearly had sufficient interest in the trial in which Silvio was attempting to increase the amount of the award to warrant allowing Vito to participate in the crucial valuation proceedings. The Appellate Division held that Vito possessed an absolute right to intervene in the proceedings as a party under R.R. 4:37-1(b). This holding clearly followed from existing precedents. *Port of N. Y. Authority* v. *Heming*, 34 N. J. 144, 167 A. 2d 609 (1961); *Morris* v. *Comptroller*, 54 N. J. L. 268, 23 Atl. 664 (Sup. Ct. 1892); 18 *Am. Jur.* 864, *Eminent Domain* §231.

The Court concluded, however, that Vito was not substantially prejudiced and was not convinced from the record before it that the case would have gone substantially better for the Lanzas if Vito had appeared as a party in his own right.

The issue presented on appeal to the New Jersey Supreme Court was whether the denial of the right to intervene to protect one's property where such right exists constitutes a denial of due process, under Amendment XIV of the United States Constitution.

The Appellate Division, by ruling as it did that the denial of intervention was not prejudicial error, treated the doctrine of substantial prejudice as the determinant of whether there has been a deprivation of due process. By deciding that constitutional issue on its evaluation of the handling of the case at the trial, the Court, in effect, decided that it makes no difference whether one speaks by himself or his own counsel, or through counsel of a co-party with whom he has been given permission to sit and consult. The New Jersey Supreme Court would not agree. It refused to say that a person is accorded due process of law when he has a right to speak but is denied that right. The right to be heard on one's own behalf is not satisfied by submitting arguments on questions through an intermediary, particularly where, as here, the litigant claims to have particular knowledge of the subject matter and factual background of the case. The requirement of due process cannot be so limited and it is a deprivation thereof to refuse a litigant entitled to be heard as a party the right to select counsel of his own choice, irrespective of the qualifications of that counsel or the probable outcome of the trial through his selection. See *Roberts* v. *Anderson*, 66 F. 2d 874 (C. C. A., 10th Circ. 1933).

In the landmark case of *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1943), where the Court failed

to appoint separate counsel for 6 individual defendants, the United States Supreme Court enunciated the following doctrine with regard to a hearing:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel employed by him and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing, and therefore of due process of law in the constitutional sense."

The general doctrine and principles expressed in the cases above regarding a hearing and right to counsel of one's own choice, or at least to speak for one's self, are particularly applicable to this case. Here, Vito's right to intervene arose at a crucial state in the proceedings. Silvio had sustained a heart attack and was seriously ill; his attorney was unable to consult personally with him. A motion for discovery had been made by Silvio's attorney. The discovery requested included prices paid by the State for properties in Round Valley, descriptions of the buildings located on the properties when purchased, and inspection of the lands and existing buildings in Round Valley. Counsel for Silvio considered this information to be "vital". Some form of discovery evidently was granted pursuant to the motion, but counsel for the parties disagreed on the form of the order and no formal order was entered. While the discovery application was thus still pending Vito moved for discovery, and filed an affidavit in support of the motion stressing the urgent need for discovery and entry of an order therefor, in view of the imminence of the trial. During this period friction developed between Vito and Silvio's attorney, which soon thereafter resulted in a motion by the attorney to withdraw from the case. There was a difference of opinion as to the advisability of seeking further appellate review before the United States Supreme

Court of the opinion of the New Jersey Supreme Court sustaining the validity of the original *Round Valley Act;* also as to whether or not to oppose the motion of the State to deposit the amount of the Condemnation Commissioner's award into Court and thereby attempt to perfect title. As the result of the failure to complete discovery and the withdrawal of Silvio's then attorney shortly before the date fixed for trial, the appellant Silvio, through hastily obtained counsel, was obliged to proceed to trial burdened with crushing handicaps, all of which detrimentally affected the interest of Vito.

At the trial, Vito was granted the courtesy, as an attorney and member of the New York Bar, to sit at the counsel table. He had no right as a party to question witnesses himself or to make any legal arguments on his own behalf in connection with matters of valuation. Who is to say but that Vito, as an attorney, familiar as he was with the background and history of this matter, could not have conducted this trial as effectively as counsel hastily summoned and compelled to try a case without what he himself considered to be adequate preparation.

It is further respectfully submitted that the application by the New Jersey Supreme Court of its rules of procedure in order to sustain the denial of Vito Lanza's application for intervention is not reasonable under the circumstances and should not prevent inquiry by this Court into the denial of his federal constitutional rights. See *Davis* v. *Wechsler*, 263 U. S. 22, 26; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 455-458.

3. The answer of appellant, Silvio Lanza, raised constitutional objections to the validity of the *Round Valley Act*, all of which were determined adversely to him. *State* v. *Lanza*, 27 N. J. 516, 143 A. 2d 57, (1958). Appeal from the New Jersey Supreme Court's decision was taken to the

United States Supreme Court, where the appeal was dismissed. At that time the decision of the New Jersey Supreme Court was not a final judgment under applicable case law. *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251. Accordingly, the appellants raised the same constitutional objections before, during and after the trial and on appeal. The appellants submit the following arguments concerning the validity of the *Round Valley Act* for consideration by this Court:

(a) The *Round Valley Act* creates a debt or liability of the State to certain municipalities and counties without submitting the questions to voters as required by the New Jersey Constitution, 1947 Const., Art. VIII, Sec. II, par. 3;

(b) The trial court erred in preventing the appellant (Silvio) from cross-examining the Commissioner with respect to his determination that the lands condemned were appropriate and useful for the purposes set forth in the *Round Valley Act*;

(c) This action was maintained contrary to the provisions of the *Round Valley Act* in that special counsel was engaged to prosecute this action;

(d) The Legislature in enacting the *Round Valley Act* unconstitutionally delegated its legislative powers to an administrative official;

(e) The Legislature appropriated funds for the purposes set forth in the *Round Valley Act* in violation of the New Jersey Constitution since the Governor did not testify as required by the Constitution of New Jersey, that there were sufficient funds on hand and anticipated for this appropriation. 1947 Const., Art. VIII, Sec. II, par. 2.

The appellants contend that, by reason of the rejection by the New Jersey courts of the above arguments, they

have been deprived of their property without due process of law, and have been denied the equal protection of law, in contravention of the Fourteenth Amendment of the United States Constitution.

4. The trial court determined that the fair value of the nursery stock was $1,975.50. When considered in the light of the credible and competent evidence adduced by the appellant Silvio Lanza that the value of his nursery stock was in excess of $250,000, the award by the Court does not only fail to give the appellant fair value for his property, but is confiscatory and constitutes a taking of his property (and the property of Vito) without due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Appellants believe that the questions presented by their appeal are substantial, and that this Court should retain jurisdiction of the cause for the reasons submitted.

Respectfully submitted,

JACOB GREEN,
Counsel for Appellants.

[APPENDICES FOLLOW]

APPENDIX A

Mandate on Affirmance of Supreme Court of New Jersey

This cause having been duly argued before this Court by Mr. Jacob Green, counsel for the appellants and Mr. Philip Lindeman, II, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the twenty-third day of April, 1963.

Filed April 23, 1963
JOHN H. GILDEA,
Clerk.

MORTIMER G. NEWMAN, JR.,
Acting Clerk of the Supreme Court.

APPENDIX B

Opinion of Supreme Court of New Jersey (190 A. 2d 374)

Argued April 2, 1963.

Decided April 23, 1963.

Jacob Green, Newark, for defendants-appellants (Donald M. Legow, Newark, on the brief).

Philip Lindeman, II, Newark, for plaintiff-respondent (Arthur J. Sills, Atty. Gen., attorney, Bernard Hellring, Sp. Counsel, Norman Bruck, Newark, and Philip L. Chapman, Palisade, on the brief).

The opinion of the court was delivered

PER CURIAM.

In July 1957 the State of New Jersey instituted these condemnation proceedings to acquire 146.39 acres of land owned by defendant Silvio A. Lanza in Round Valley, Clinton Township, Hunterdon County, New Jersey. The tract, and others in the vicinity, were to be used in the construction of the Round Valley reservoir. The Law Division of the Superior Court appointed commissioners in November 1957 to value the land to be taken. State by McLean v. Lanza, 48 N. J. Super. 362, 137 A. 2d 622 (Law Div. 1957). Lanza appealed claiming, among other things, that the legislation authorizing the acquisition of the Round Valley area was unconstitutional. This court held against him. State by McLean v. Lanza, 27 N. J. 516, 143 A. 2d 571 (1958), appeal dismissed, 358 U. S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959), rehearing denied, 359 U. S. 932, 79 S. Ct. 606, 3 L. Ed. 2d 634 (1959).

The commissioners awarded Lanza $38,425. He appealed and after a 22-day trial without a jury in the Law Division,

compensation for the taking was fixed at $57,623.93. The Appellate Division affirmed, 74 N. J. Super. 362, 181 A. 2d 390 (App. Div. 1962); his appeal followed to this court.

About a year after the institution of this action, on June 24, 1958, Silvio Lanza executed a deed for an undivided one-tenth interest in the land to his brother, Vito Lanza, a member of the bar of the State of New York, and a resident of that state. The deed was recorded on June 30, 1958. By notice dated June 23, 1958 (one day before the execution of the deed), Vito signed and subsequently served a "Notice of Claim and Notice of Appearance and Demand on Intervention" in the proceedings, alleging ownership of a one-tenth interest in the land. The notice simply alleged that he was a "co-owner and tenant in common of a one-tenth right, title and interest in and to all the property encompassed" in the condemnation proceeding. There was no reference to the date when, or the deed by which, the alleged interest was acquired. It was not supported by any affidavit or any pleading under R.R. 4:37-4. The State moved to expunge the appearance; Vito then sought to support his application to intervene by an affidavit which did no more than recite the execution of the deed. No facts were detailed as to the dates of execution or recording of the deed, the circumstances attending Silvio's giving of the deed, or the reason for, or the consideration for, the deed at that late date in the progress of the cause. In the argument of the matter the Law Division judge inquired of Vito whether the facts surrounding the transaction were set out in affidavit form. Since Vito had been very much in evidence at all stages of the previous proceedings, particularly in regard to difficulties with Silvio's New Jersey counsel, obviously the court was seeking light as to whether the deed was merely a sham, a device to enable Vito to act as attorney in the case. Vito conceded the facts concerning the deed were not in affidavit form, but did not then or at

any later time thereafter during the lengthy proceedings, when his application to intervene was renewed, present such an affidavit. On denial of the application for intervention, Vito appealed. On March 6, 1959 the Appellate Division dismissed the appeal for failure to file an adequate appendix and brief. State by McLean v. Lanza, 60 N. J. Super. 130, 158 A. 2d 351 (App. Div. 1959).

In discussing the matter, the Appellate Division said:

> "The present appeal was precipitated by the following circumstances. Vito, a New York lawyer and resident, has been advising and collaborating with Silvio, his brother, in connection with every phase of this case since its inception, including regular attendance at the current valuation trial. This has included participation in the engagement of and dealings with various New Jersey counsel who have represented Silvio in the matter since the beginning. There have been three or four of these in succession, and disagreements with counsel have been frequent. On June 30, 1958 (three days after the decision of the New Jersey Supreme Court cited above) there was recorded in the Hunterdon County Clerk's office a deed by Silvio, dated June 24, 1958, purporting to convey an undivided one-tenth interest in the lands in question to Vito. The revenue stamps on the deed indicate a consideration of $10,000. [In the brief filed in this court on the present appeal, in the 'Statement of Facts' explaining the consideration for the deed, Vito says that over a period of time in connection with Silvio's alleged nursery business on the land, he advanced various sums 'which eventually aggregated in excess of $4,000.' He asserts that he expended time and effort in the management and improvement of the business. Again, the allegation is not in testimony or affidavit form. (Interpolation ours.)]

Appendix B

> Vito has told the court the consideration for the transfer consisted of past advances to Silvio. The representative of the Attorney General suggests that the conveyance is actually a subterfuge to enable Vito, a lawyer having no standing at the bar of this State, in effect to represent Silvio in this case through the guise of appearances *pro se* as a party. The past history of these proceedings, and even the papers filed in the present appeal, lend substantial color to the assertion, but we need not determine the question, in view of the present disposition of the appeal." 60 N. J. Super. at pp. 132-133, 158 A. 2d at p. 352; see, also, State by Bontempo v. Lanza, 60 N. J. Super. 139, 158 A. 2d 355 (App. Div. 1960).

On May 25, 1959 we denied an application for certification from the dismissal of the appeal "without prejudice to the renewal of the grounds sought * * * to be raised on appeal from final judgment." Trial of the compensation aspect of the case was proceeding in the Law Division during the processing of the appeal from the denial of intervention. It began on October 30, 1958 and was concluded on July 6, 1959, final judgment being entered in favor of Silvio Lanza for $57,623.93.

Silvio Lanza's appeal from the final judgment was joined in by Vito who again attacked the refusal of the Law Division to grant him permission to intervene as a party defendant in the proceedings. As we have said, the Appellate Division sustained the trial court on all aspects of both appeals. As to Silvio Lanza, we affirm for the reasons stated in the Appellate Division opinion. See 74 N. J. Super. 362, 373-380, 181 A. 2d 390. We affirm also the denial of Vito's application to intervene but do so on grounds other than those set forth in that opinion. The Appellate Division concluded that intervention should have been

granted but the refusal occasioned no prejudice since Vito was "Silvio's close advisor and collaborator at all times in this entire litigation, before and after the denial of intervention. * * * He sat and conferred with Silvio's trial counsel at all times during the appeal hearing," and "we are not convinced from the record before us that the case would have gone substantially better for the Lanzas if Vito had appeared as a party in his own right rather than as the directing mind behind Silvio as defendant." 74 N. J. Super., at pp. 372-373, 181 A. 2d at p. 396. We cannot agree that if Vito was entitled to intervene in his own interest, his active collaboration with Silvio's attorney during the proceedings can be considered equal in law to *pro se* participation in protection of his right as one-tenth owner of the premises. In our judgment, however, the record presented does not establish Vito's claimed right to intervene, under the applicable practice rules, R.R. 4:37-1, 3, 4, with sufficient clarity to warrant a finding that the trial court either erred as a strict matter of law or abused its discretion in denying the motion.

Vito had been in the case informally from its inception. The unsworn facts asserted as the basis for the deed to him of a one-tenth undivided share in the land, if true, existed prior to the institution of the condemnation proceedings. The interest of the State in Round Valley as a reservoir was common knowledge for a considerable period of time. And the legislation authorizing acquisition of the "area commonly known as Round Valley" became effective July 1, 1956, L. 1956, c. 60, N.J.S.A. 58:20-1 et seq., a year before this proceeding was begun. No satisfactory explanation has ever been furnished as to why after this suit had been in progress for a year, Silvio suddenly decided to deed the small undivided interest to Vito. It is plain from the record that the brothers had not been able to get along with

their various attorneys. In the absence of sworn proof as to the reason for the deed, strong suspicion arises as to the good faith of the transaction, and whether it was not done solely to precipitate Vito into the case as a party and attorney *pro se*. It cannot go unnoticed that the Law Division judge who first heard the motion to intervene advised Vito (who was allowed to argue the matter personally) that he would not consider oral statements that an alleged indebtedness of Silvio to Vito provided the consideration for the deed. They would have to be in affidavit form. See, R.R. 4:44-4. Yet no leave was sought to file such affidavit, nor was it supplied to the actual trial judge on subsequent occasions when the motion to intervene was renewed.

[1, 2] Grant of permission to intervene in an action is committed in the first instance to the trial court. Ordinarily such applications are treated liberally there. But this case was attended with difficulties, delays and conduct which at the trial level were deemed sufficient to require clear proof of justification for the motion to intervene. See, e. g., State by Bontempo v. Lanza, supra (60 N. J. Super., at p. 143, 158 A. 2d at p. 358). Our own examination of the total circumstances of the case satisfies us we should not interfere with the considered judgment of the trial judges that a case for intervention was not adequately made out under R.R. 4:37-1, 3, 4, or R.R. 4:44-4.

Affirmed.

For affirmance: Chief Justice WEINTRAUB, and Justices JACOBS, FRANCIS, PROCTOR and SCHETTINO—5.

For reversal: None.

APPENDIX C

Opinion of the Superior Court of New Jersey, Appellate Division

Argued Nov. 6, 1961 and March 12, 1962
Decided May 18, 1962.

Jacob Green, Newark, argued the cause for appellants (Donald M. Legow, Newark on the brief).

Philip Lindeman II, Newark, argued the cause for respondent (Arthur J. Sills, Atty. Gen., of New Jersey, attorney; Bernard Hellring, special counsel; Philip Lindeman, II, Norman Bruck, Newark and Philip L. Chapman, Palisade, on the brief).

Before Judges CONFORD, FREUND and LABRECQUE.

The opinion of the court was delivered by

CONFORD, S.J.A.D.

This is a condemnation action commenced July 10, 1957 by the plaintiff State of New Jersey to acquire lands of defendant Silvio A. Lanza situated in the area commonly known as Round Valley, for purposes of constructing a water supply reservoir, pursuant to L. 1956, c. 60, N.J.S.A. 58:20-1 et seq. Among other defenses interposed by that defendant (hereinafter referred to as Silvio) was the contention that the enabling act was unconstitutional. This question was determined adversely to him in the Supreme Court on June 27, 1958. State v. Lanza, 27 N. J. 516, 143 A. 2d 571 (1958). The United States Supreme Court dismissed an appeal from that ruling for lack of a substantial federal question. Lanza v. State, 358 U. S. 333, 79 St. Ct. 351, 3 L. Ed. 350 (1959).

Appendix C

Final judgment was entered in favor of the State in the Law Division November 27, 1957. An award of $38,425 for Silvio's interest was made by condemnation commissioners on February 27, 1958. An appeal from this award by Silvio was tried in the Law Division, consuming 22 trial days over the period from October 30, 1958 to July 6, 1959. The result was a 31-page opinion by the trial judge, wherein, after an exhaustive analysis of the evidence and opposing arguments, the sum of $57,623.93 was arrived at as "just compensation" for all of the property involved. An appropriate judgment was filed October 2, 1959. Of the two separate appeals now before us for disposition, one is from the said judgment.

The second appeal before us is by Vito Lanza (hereinafter referred to as Vito), brother of Silvio, from certain orders entered in the Law Division, before and at the trial of the appeal, denying his application for intervention in the case as a party in interest. However, we granted Vito leave provisionally to participate in the appeal on the meritorious question while prosecuting the intervention appeal, and he has been heard with respect thereto.

I

We deal first with the intervention appeal. The circumstances surrounding Vito's acquisition of his interest in the property and attending the original denial of his claim to intervention by order dated August 1, 1958 are detailed in State v. Lanza, 60 N. J. Super 130, 158 A. 2d 351 (App. Div. 1959), and will not be repeated here. (The case cited was a dismissal of an earlier appeal by the Lanzas from orders of the Law Division, including the denial of intervention, because of inadequate prosecution of the appeal.) Suffice it here to say that Silvio, by deed dated June 24, 1958 and recorded June 30, 1958, conveyed an undivided

one-tenth interest in the lands in question to Vito. In the earlier appeal Vito told the court the conveyance was in consideration of past advances to Silvio. No proof justifying a conclusion that this was not a valid instrument legally transferring the purported interest to Vito has ever been submitted to the court. We consequently treat Vito as owner of an undivided one-tenth interest in the real estate for purposes of the legal issue presented.

The motion for intervention was renewed before the trial judge at the inception of the trial as well as later in its course but was denied each time, finally by order dated September 29, 1959. However, Vito, who is a New York lawyer, attended all trial sessions and sat and consulted with trial counsel for Silvio continuously during the course of the trial. Moreover, he has advised Silvio and consulted with previous counsel for Silvio during the whole course of the litigation. See State v. Lanza, supra 60 N. J. Super., at pp. 132, 133, 158 A. 2d 351; State v. Lanza, 60 N. J. Super. 139, 158 A. 2d 355 (App. Div. 1960). A petition for certification of our dismissal of the previous appeal was dismissed by the Supreme Court, but "without prejudice of the renewal of the grounds sought here to be raised on appeal from final judgment."

The State suggests that since Vito has had one opportunity to appeal the denial of intervention which he wasted by failure to prosecute the appeal, thereby incurring the dismissal mentioned above, he should not be accorded another opportunity. However, the language of the Supreme Court order dismissing the petition for certification of the dismissal suggests to us the advisability of disposing of the question so that this already excessively protracted litigation may be brought to a final termination.

We have concluded that Vito Lanza was entitled to intervention but that the denial of this application has not visited

upon him and his property interests such prejudice as would justify nullification of the hearing and determination of the appeal in the Law Division respecting just compensation for the taking and incidental related issues.

The practice rules here applicable read as follows:

4:37-1. Intervention of Right

Upon timely application anyone shall be permitted to intervene in an action: (a) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (b) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof;* * *."

"4:37-3. Permissive Intervention

Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

"4:37-4. Procedure

A person desiring to intervene shall serve a motion to intervene upon all parties [affected thereby]. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." (The bracketed portion was deleted by amendment of September 11, 1961.)

Appendix C

Of interest are also the following provisions of R.R. 4:92, Condemnation. R.R. 4:92-2 provides, in part:

> "The record owner, the occupant, if any there be, such other persons appearing of record to have any interest in the property and such persons claiming an interest therein as are known to the plaintiff shall be made parties."

Under R.R. 4:92-6(c) an appeal from the report of the commissioners need be served "only * * * on parties or persons in possession and parties who have an interest in [the property] involved in the appeal and who shall have appeared personally or by attorney before the commissioners."

There is no specific practice rule governing intervention in a condemnation case. It is therefore to be assumed that R.R. 4:37 is intended to be applicable thereto. There is no New Jersey case directly in point. This condition of our practice may be contrasted with the comparable Federal Rules. Although our R.R. 4:37-1(a), (b), 4:37-3 and 4:37-4 are basically derived from Federal Civil Rule 24, 28 U.S.C.A., yet the Federal Rules were from their adoption in 1938 expressly declared not applicable to condemnation proceedings except in relation to judicial appellate review. Rule 81(a)(7); see 7 Moore's Federal Practice (1955), p. 4417. There was no federal practice rule for condemnation until the adoption of Rule 71A, which became effective August 1, 1951. This makes the general rules of practice applicable to proceeding in condemnation except as specifically provided in Rule 71A. While that rule contains no express reference to intervention, the following provision of "(c) *Complaint*" thereof would appear in effect to justify allowance of intervention where a situation like that of Vito Lanza's presented to a federal court: "Up-

on the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names" are ascertainable by search of the records or are otherwise know.

In United States v. Certain Parcels of Land, etc., 102 F. Supp. 691 (W. D. Pa. 1952), involving condemnation as of prior to the adoption of Rule 71A, it was held notwithstanding an application for intervention in condemnation was a matter of descretion under the then existing practice, yet one succeeding in interest to the realty after the declaration of taking, and asserting a claim for additional compensation and damages, should be allowed to intervene on principles of "justice and through administration of the law," since the proceeding from the declaration of taking through to distribution "is one continuous integrated process of litigation" (at p. 693). Cf. United States v. 1,830.62 A. of Land in Botetourt County, 51 F. Supp. 158 (W.D. Va. 1943); Oliver v. United States, 156 F. 2d 281 (8 Cir. 1946).

Vito argues an absolute right to intervene under either (a) or (b) of R.R. 4:37-1, or, in the alternative, a discretionary right under R.R. 4:37-3. We confine our consideration and holding here to (b) of R.R. 4:37-1. In the broad sense, there was property, whether regarded as the land or the compensatory fund, in which he had a one-tenth undivided interest, and the *quantum* of compensation was within the determinative disposition of the court. As a part owner of the property, Vito, clearly had sufficient interest in the attempt to increase the amount of the award by the appeal to the Law Division to warrant allowing him

to participate in the crucial valuation proceedings thereafter as a party. Cf. Koppel v. Olaf Realty Corp., 56 N. J. Super. 109, 121, 151 A. 2d 577 (Ch. Div. 1959), affirmed 62 N. J. Super. 103, 162 A. 2d 306 (App. Div. 1960). The rule should be liberally construed, 2 Schnitzer and Wildstein, N. J. Rules Service, A IV-1184 (6-16-60), and cases there cited.

The State argues the application was not timely. But it was made almost immediately upon Vito's acquisition of the deed. Moreover, being prior to the trial of the appeal, it was at a time when the most vital aspect of the proceeding was yet to come. Compare Federal Rule 71A(c), cited above. Nor does it appear that granting intervention at the time of the application would have entailed appreciable prejudice to the other parties or the court. See 2 Schnitzer and Wildstein op. cit., supra, at A IV-1214 (6-16-60) and cases cited. See also Lieberman v. Neptune Twp., 50 N. J. Super. 192, 200, 141 A. 2d 553 (App Div. 1958).

While there is a question as to whether there was a strict compliance with the requirement of the rule for filing with the motion "a pleading setting forth the claim or defense for which intervention is sought," see State v. Lanza, supra 60 N. J. Super., p. 136, 158 A. 2d 351, we now conclude that substantial satisfaction of the intent of the rule was afforded, in view of the nature of the particular case, by the recital in the "notice of intervention" of joinder in the pleadings of Silvio Lanza.

While we thus agree that Vito should have been admitted as an intervenor when he applied in June 1958, we cannot accept the contention that the failure then to admit him aborts the judgment and requires a new valuation trial at which Vito may participate as a party *in propria persona*. We are satisfied that he was not substantially prejudiced. It is undenied, as noted above, that he was Silivo's close

advisor and collaborator at all times in this entire litigation, before and after the denial of intervention. He participated in the hiring and discharging of the numerous attorneys who have represented Silvio herein at various times. He sat and conferred with Silvio's trial counsel at all times during the appeal hearing. Vito cites disagreements with counsel from time to time, alleging consequent hampering of full protection of both his and Silvio's rights; he also asserts that Silvio was ill when the valuation case was being prepared for trial. However, we are not convinced from the record before us that the case would have gone substantially better for the Lanzas if Vito had appeared as a party in his own right rather than as the directing mind behind Silvio as defendant. We conclude the denial of intervention was not prejudicial error such as to justify a reversal.

II

Defendants argue that the trial court's evaluation of their property, real estate as well as nursery stock, as taken by the State, is substantially below what the weight of the evidence of record called for. It is also contended that the court's conclusion as to the number of trees on the property was erroneous and unfounded. After a careful review of the testimony and exhibits we find no reason to disturb the trial findings in these respects. Fundamentally implicated here were matters of appraisal of the credibility and reliability of the opinions of expert witnesses, of credibility as to matters of fact involved in the testimony of witnesses, lay and expert, including the defendant Silvio Lanza, and questions as to the evidential weight to be accorded sales of allegedly comparable property. Such matters must ordinarily depend largely upon the trial judge's judgment as to the reliability and probative weight of evidence of this-

character. In the present case we have before us an extended opinion by the trial judge demonstrating an unusual degree of conscientious consideration of and reflection upon the proofs and a well-reasoned exposition of the several bases for the findings arrived at. He was at pains to express his specific impressions as to the credibility of named witnesses and to give his reasons. While we may not necessarily agree with all aspects of the evaluation of the proofs as stated in the opinion, we do not find the ultimate conclusions of fact and value vulnerable to anything set forth in the brief of the defendants or asserted on their behalf at oral argument. We concur in the adjudication in the Law Division of defendants' damages and loss in the sum of $57,623.93 substantially for the reasons set forth in the opinion of the trial court.

III

Defendants specifically attack the appointment by the trial court, over their objection, of an independent expert to count and testify before the court as to the number and value of trees (nursery stock) on the property. It is contended the trial judge was without authority to take this action. The witness so engaged testified subject to cross-examination by defendant.

At the time the court acted, prior to which defendants were given ample opportunity to be heard, and indeed were successful in their objections to the use of one such proposed expert, the court had heard testimonial estimates of the number and value of the trees varying from 2,250 trees worth $573, by a state expert, to 89,484 trees of a value of $259,728, by a defense expert. The trial court justifiably described this state of the proofs as "shocking in disparity as to the quantity, quality and value of the

nursery stock." In this condition of the evidence the trial court was entirely within its proper judicial discretion in taking the initiative toward apprising itself of the findings and opinion of an independent expert on a matter so vital to a quest for the elusive truth of the matter. We approve and adopt the reasoning by Judge Gaulkin in Polulich v. J. G. Schmidt Tool Die & Stamping Co., 46 N. J. Super. 135, 146-149, 134 A. 2d 29 (Cty. Ct. 1957), in support of the discretionary right of a trial judge to take such measures in an appropriate case, reasonably subject to an opportunity by all parties to be apprised of the identity of the expert witness in advance of his testimony, upon request. cf. R.R. 4:16-2, and of course to cross-examine as fully as in the case of a witness produced by the opposing side. See also State v. Butler, 27 N. J. 560, 600, 601, 143 A. 2d 530 (1958); Band's Refuse Removal, Inc. v. Fair Lawn Bor., 62 N. J. Super. 522, 548, 163 A. 2d 465 (App. Div. 1960), certif. denied 33 N. J. 387, 164 A. 2d 849, 1960.

Moreover, we do not agree with defendants' contention that the recent adoption of R.R. 4:25A, dealing with the appointment and use of medical experts in certain restricted situations, implies a blanket disapproval by the Supreme Court of the use of impartial experts in all other situations whatsoever. Even if we were to construe that rule as having such intent, it would clearly not be retrospective in effect so as to infect the validity of the adjudication before us here for review.

We conclude there was no error or mistaken exercise of discretion by the trial court in the matter here discusssed.

IV

The defendants argue that these condemnation proceedings are void in entirety in that the State failed to acquire the property within two years from the effective date of

the original enabling act, L. 1956, c. 60 (N.J.S.A. 58:20-1 et seq.) or by June 1, 1958. That act provides that the Commissioner of Conservation and Economic Development "is authorized and directed to acquire, in the name of the State, within 2 years from the effective date of this act" such part of the Round Valley area deemed appropriate and useful for a new water supply system. As of June 1, 1958 the State had not yet tendered to defendant Silvio Lanza nor deposited into the court the sum theretofore awarded by the condemnation commissioners, and therefore, under N.J.S.A. 20:1-12, the State had not yet become entitled to "take possession of the land" for the purposes for which it was authorized to be taken. The State does not now controvert the proposition that, accordingly, it had not yet by the date indicated "acquired" defendant's property.

The State contends, however, that it was amply warranted in proceeding to acquire the property, which it did later by payment of the award into court, under the authority of L. 1958, c. 57, which amended section 1 of the 1956 act, so far as is here material by substituting the phrase "on or before December 31, 1958" for the original specification of the time for acquisition, "within 2 years from the effective date of this act." The 1958 amendment, however, although passed by the Legislature May 19, 1958, did not become effective until June 12, 1958 because not approved by the Governor until then. Defendants contend that the expiration of the period stipulated for acquisition of the property on June 1, 1958 without any *then existent* legislative extender necessarily had the effect of killing the condemnation proceedings then pending without possibility of revival; and that the only effect of the 1958 act was to authorize the reinstitution of new condemnation proceedings from the beginning, to be capped *thereafter* by acquisition of the property on or before December 31, 1958.

The State argues, on the other hand, that the intent and effect of the 1958 act was to validate the proceedings so far as they had progressed and to permit acquisition of the property at any time thereafter prior to December 31, 1958.

In support of their position defendants cite, among other authorities, State, Copeland, Pros. v. Village of Passaic, 36 N. J. L. 382 (Sup. Ct. 1873); Town of Belvidere v. Warren R. R. Co., 34 N. J. L. 193 (Sup. Ct. 1870); McLaughlin v. Newark, 57 N. J. L. 298, 30 A. 543 (Sup. Ct. 1894); and State, ex rel. Doyle v. City of Newark, 34 N. J. L. 236 (Sup. Ct. 1870). None of them supports their argument here. The first two cases cited deal with the effect of repealing statutes. There is no problem as to a repealed or repealing statute in the instant case. The expiration of the time stipulated in the 1956 act for acquisition of the property did not constitute a repeal or the equivalent of a repeal of the act. Even a repealing statute may be qualified in its ordinarily terminating effect on proceedings taken under the repealed act if the Legislature so manifests its intent in the repealing act. State, Copeland, Pros. v. Village of Passaic, supra (36 N. J. L., at p. 384). The McLaughlin case, supra, holds a statute cannot make itself operative as of a date prior to its enactment. But this obviously does not affect the power of the Legislature, within constitutional limits, to legislate effect upon prior transactions. Retrospective legislation is commonplace. The Doyle case, supra, is cited by defendants for its *dictum* that the Legislature cannot revive an assessment previously held void by judicial judgment. There is no analogy here.

The question before us is simply one of legislative intent. When enacting L. 1958, c. 57, was it the intent of the Legislature to require the reinstitution *ab initio* of the State's condemnation proceedings against the Lanza property merely because the original two-year limitation period for

acquisition of the property might transpire prior to such acquisition and the date of approval of the bill by the Governor, the bill having passed both houses by May 19, 1958 with a provision that it should take effect immediately? What rational purpose would the Legislature have had in mind, if, as defendants aver, it was intended that the Commissioner should file a new complaint and activate a new hearing before condemnation commissioners by mere virtue of a delay by the Governor in approving the amendatory bill beyond June 1, 1958? We perceive none, and defendants' argument points none out to us. They concede that if the bill had become effective on or before June 1, 1958, they would have no argument.

Defendants argue that legislation is presumed not to have retrospective effect unless the contrary intent is clearly manifest. We agree. But we do not agree that such intent is not here manifest, having regard not only for the statutory language but also for all the surrounding circumstances. Moreover, the 1958 act may properly be regarded as remedial in purpose and objective in enlarging the time period for acquisition of the property needed for the water supply project. In such case the presumption is rather for retrospective than for solely prospective effect, absent a clear indication of contrary intent. Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N. J. 372, 382, 102 A. 2d 587 (1954). While the latter rule is usually stated as applicable "in cases pending when it takes effect," id., at p. 381, 102 A. 2d at p. 591, this is merely because the situation usually arises in that context. There is no good reason (we consider the constitutional implications *infra*) why the rule as to presumptive retrospective effect of remedial legislation should not apply here notwithstanding the temporary lapse of condemnatory power on June 1, 1958, if the presumption plainly accords with the indicia of actual intent, as here it does.

Appendix C

L. 1958, c. 57, originated as Senate Bill 189, introduced April 21, 1958. The measure passed the Senate April 28, 1958 and the House of Assembly May 19, 1958, under an emergency resolution. The Legislature may be assumed to have been aware of all facts affecting the subject matter of the legislation, including the impending expiration on June 1, 1958 of the time previously limited for acquisition of property for the Round Valley water project. The Lanza litigation was particularly well known at the time, as there was then pending, as noted above, an attack upon the constitutionality of the enabling act which was decided favorably to the State by the Supreme Court on June 27, 1958 (27 N. J. 516, 143 A. 2d 571) after a long and troublesome litigation. As was stated in State v. Spindel, 24 N. J. 395, 402, 403, 132 A. 2d 291, 295 (1957):

> "There is no discernible reason of policy for abstract legalism in evaluating the legislative expression. The reason of the enactment prevails over the literal sense of terms. Fischer v. Fischer, 13 N. J. 162, 98 A. 2d 568 (1953); Wright v. Vogt, 7 N. J. 1, 80 A. 2d 108 (1951). The manifest policy of a statute is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. Wene v. Meyner, 13 N. J. 185, 98 A. 2d 573 (1953). The occasion and necessity of the law, the mischief felt and the remedy in view are the factors to be considered in the exercise of the interpretive function; and the intention is to be taken or presumed according to what is consonant to reason and good discretion."

To infer that the Legislature actually intended a waste of all the time, effort and expense which had been incurred by both the State and the Lanzas in the condemnation

proceedings up to June 1, 1958 in the contingency that the Governor should withhold approval of Senate Bill 189 until after June 1, 1958, is to fly in the face of reason. The only sensible reconstruction of the lawmakers' intent as to the effect of the anomalous situation which here came about by reason of the delay in approval of the bill is that any condemnation proceedings pending on June 1, 1958 were to be accorded renewed vitality subject to acquisition of the property by the State by December 31, 1958. We so hold. This result is in accord with the decision of the Indiana Supreme Court in a fairly parallel situation. Milk Control Board v. Pursifull, 219 Ind. 49, 36 N. E. 2d 850 (Sup. Ct. 1941). The court there declined to permit a comparable delay in effectuation of an extender bill to "thwart the purpose and intention of the Legislature." (36 N. E. 2d, at p. 851.) Cf. Fenolio v. Sebastian Bridge Dist., 133 Ark. 380, 200 S. W. 501 (Sup. Ct. 1917); State v. Bailey, 56 Kan. 81, 42 P. 373 (Sup. Ct. 1895); Kersten v. United States, 161 F. 2d 337 (10 Cir. 1947), cert. denied 331 U. S. 851, 67 S. Ct. 1744, 91 L. Ed. 1859 (1947).

Defendants cite the introducer's statement appended to Senate Bill 189 as evidence that the only purpose of the bill was to permit the Commissioner to acquire five small parcels of land whose owners could not be located. The statement also recites: "The acquisition of all other land has been completed." The statement is relevant evidence as to the legislative intent, but "a considered judgment must be exercised in determining the weight to be attached to it." Morris & Essex Invest. Co. v. Director of Div. of Taxation, 33 N. J. 24, 34, 161 A. 2d 491 (1960). The stated intent of the introducer must here be accorded little weight in view of his obvious misinformation as to the fact that the Lanza property had not yet actually been acquired. We are not permitted to assume that the Legislature as a whole was equally without knowledge of the facts.

Appendix C

Defendants urge that if we accept the State's contention as to the effect of L. 1958, c. 57, the result would be to deprive them of their property without due process of law. We do not agree. Everything which had been done in the course of the condemnation proceedings up to June 1, 1958 was done in full accord with the law and with constitutional principles. The revival of the proceedings after the 11-day hiatus had only the practical effect upon the defendants of permitting the State to take possession of the property upon tendering or paying into court the amount of the condemnation award theretofore made in proceedings of which they had had full notice and an opportunity to participate. (Vito's rights as an intervenor were subject to the status of the proceedings as they stood as of the time of his petition, filed June 26, 1958; Wolpe v. Poretsky, 79 U. S. App. D. C. 141, 144 F. 2d 505, 508 (D. C. Cir. 1944), cert. denied 323 U. S. 777, 65 S. Ct. 190, 89 L. Ed. 621 (1944). He therefore has no special basis to complain he was deprived of a hearing before the commissioners.) Defendants still retained, unimpaired, the right of appeal of the amount of the award in the Superior Court, and we have held above they both have, in effect, been accorded the benefit of it. They have sustained no deprivation of their property without due process in any significant or substantial sense of that term. The Lanzas do not demonstrate that the nature of their rights on June 2, 1958 was such that to accord chapter 57 the effect we have adjudicated would constitute "arbitrary state action" against a then "present fixed interest" contrary to principles of "right reason and natural justice." See Pennsylvania Greyhound Lines, Inc. v. Rosenthal, supra, 14 N. J., at p. 384, 102 A. 2d 587.

Other grounds of appeal argued have been given consideration and are found without merit.

Judgments affirmed; costs to go in the usual course, except that no costs are allowed as to the intervention appeal.

APPENDIX D

Round Valley Act and Amendments

SENATE, No. 304

STATE OF NEW JERSEY
Introduced May 17, 1956
By MR. McCAY
(Without Reference)

AN ACT authorizing and directing the Commissioner of Conservation and Economic Development to acquire certain property in the name of the State for water supply and other public purposes and making an appropriation therefor.

WHEREAS, It has been long recognized that additional supplies of water will be needed to meet the future requirements of the people of the State; and

WHEREAS, To meet this need, various proposals have been made for the creation of new water supply systems and, in particular, the projects for the establishment of a water supply system to be known as the Round Valley Water Supply System, for the use of the Delaware river waters; and

WHEREAS, It is advisable to authorize the acquisition of certain real property which will be needed for additional water supply systems, without awaiting the enactment into law of such statutes as may be necessary to specifically create and establish new and additional water supply systems; now, therefore,

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

Appendix D

1. The Commissioner of Conservation and Economic Development is authorized and directed to acquire, in the name of the State, within 2 years from the effective date of this act, such part of the area commonly known as Round Valley, located in Hunterdon County, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries.

2. Acquisition of said real property authorized and directed by this act may be made by purchase or by the exercise of the power of eminent domain, pursuant to the provisions of Chapter 1 of Title 20 of the Revised Statutes.

3. In the event of condemnation proceedings pursuant to this Act, the Attorney-General shall represent the State and the Commissioner of Conservation and Economic Development.

4. Real property acquired pursuant to this act shall be held primarily for use in connection with a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries, but shall also be made available, as a State reservation, for recreational and other State uses consistent with its primary use, in accordance with rules and regulations to be promulgated by the Commissioner of Conservation and Economic Development.

5. To the end that municipalities may not suffer loss of taxes by reason of the acquisition and ownership by the State of New Jersey of property therein, the State Treasurer upon certification of the Commissioner of Conservation and Economic Development shall pay annually to each municipality in which property is acquired pursuant to this

act a sum equal to that last paid as taxes upon such land for the taxable year immediately prior to the time of its acquisition.

The State Treasurer shall also pay to any county or municipality the cost of relocating any municipal or county roads made necessary by reason of the acquisition or use of property pursuant to this act.

6. No part of funds appropriated by this act shall be used for any purpose other than for payment of the cost of acquisition of real property by purchase or condemnation award, expenses incurred for the examination of title to the property to be acquired and for expert appraisals and testimony with regard as to the value of property to be acquired.

7. There is hereby appropriated to the Department of Conservation and Economic Development for the purposes of this act, $3,000,000, or so much thereof as may be needed, from the Veterans Loan Guaranty and Insurance Fund established pursuant to chapter 126 of the laws of 1944, as heretofore amended, which is in excess of the total amounts of guaranteed or insured loans outstanding now or hereafter as obligations of the Veterans Loan Authority created pursuant to said chapter.

8. This act shall take effect immediately.

Approved June 1, 1956.

Laws of 1956 Chapter 60 (N.J.S.A. 58:20-1 et seq.).

Chapter 215

SENATE No. 304

AN ACT to amend "An act authorizing the directing the Commissioner of Conservation and Economic Develop-

ment to acquire certain property in the name of the State for water supply and other public purposes and making an appropriation therefor," approved June 1, 1956 (P.L. 1956, c. 60).

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

1. Section 1 of the act of which this act is amendatory[54] is amended to read as follows:

1. The Commissioner of Conservation and Economic Development is authorized and directed to acquire, in the name of the State, within 2 years from the effective date of this act, such part of the area commonly known as Round Valley, located in Hunterdon County, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be [solely]* either the Delaware river, exclusive of its tributaries, *or the south branch of the Raritan river or both.*

No water shall be pumped from the south branch of the Raritan river into a reservoir constructed in said area whenever the flow in said river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey stream gauging station at Manville or less than 90 million gallons daily at the United States Geological Survey stream

[54] N.J.S.A. 58:20-1.

Changes or additions in text are indicated by italics.

* Brackets indicate deletions.

gauging station at Bound Brook, nor shall water be pumped from said river into such reservoir during the [months of June, July, August and September] *period from June 15 to September 15 in any year.*

Whenever the flow of water in the south branch of the Raritan river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey stream gauging station at Manville, or less than 90 million gallons daily at the United States Geological Survey stream gauging station at Bound Brook, a sufficient amount of water shall be released from such reservoir or from such other reservoir or reservoirs as may be constructed on the south branch of the Raritan river or its tributaries in such amounts as will maintain not less than the said flows of 40 million gallons daily at Stanton and 70 million gallons daily at Manville and 90 million gallons daily at Bound Brook, and such released water shall be returned to the south branch of the Raritan river at the point of diversion or pumping into such reservoir or at some point upstream thereof.

Upon the completion and placing in operation of such reservoir in the Round Valley area, not less than 830,000 gallons of water daily shall be released at all times into Prescott brook from such reservoir and at all times not less than 170,000 gallons of water daily shall be released into the south branch of the Rockaway creek from such reservoir.

2. Section 4 of the act of which this act is amendatory[55] is amended to read as follows:

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[55] N.J.S.A. 58:20-4.

Appendix D

4. Real property acquired pursuant to this act shall be held primarily for use in connection with a water supply system the source of which shall be [solely] *either* the Delaware river, exclusive of its tributaries, *or the south branch of the Raritan River or both*, but shall also be made available, as a State reservation, for recreational and other State uses consistent with its primary used, in accordance with rules and regulations to be promulgated by the Commissioner of Conservation and Economic Development.

3. Section 5 of the act of which this act is amendatory[56] is amended to read as follows:

5. To the end that municipalities may not suffer loss of taxes by reason of the acquisition and ownership by the State of New Jersey of property therein, [at The,] *the* State Treasurer upon certification of the Commissioner of Conservation and Economic Development shall pay annually on *October 1* to each municipality in which property is acquired pursuant to this act [prior to the commencement of the actual construction of the water supply system,] *(a)* a sum equal to that last paid as taxes upon such land for the taxable year immediately prior to the time of its acquisition, *and (b) in addition, for a period of 13 years beginning with the year 1958 the following amounts: in the first year a sum of money equal to that last paid as taxes upon improvements upon such land for the taxable year immediately prior to the time of its acquisition; and thereafter the following percentages of the amount paid in the first year, to wit, second year 92%; third year 84%; fourth year 76%; fifth year 68%; sixth year 60%; seventh year 52%; eighth year 44%; ninth year 36%; tenth year 28%; eleventh year 20%; twelfth year 12%; thirteenth year 4%.*

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[56] N.J.S.A. 58:20-5.

Appendix D

[b. Upon the commencement of such actual construction, the State Treasurer upon such certification shall pay to each said municipality during each of the first 15 years following such commencement a sum of money in lieu of taxes which sum shall be computed in each of said years and shall be in an amount equal to the product obtained by multiplying the assessed value of the land and improvements, if any, for the taxable year immediately prior to the time of its acquisition for water supply purposes by the rate of taxation for the year in which the computation is made, but in no case shall such sum be less than the amount of taxes paid upon such land and improvements, if any, for the said prior taxable year.]

[c. At the expiration of said 15 year period the State Treasurer upon such certification shall pay annually to each such municipality a sum of money in lieu of tax equivalent to the amount of taxes that would have been payable on such property if it had not been taken for water supply purposes, but in computing such sum the property shall be treated as though it were lands of private persons and also as though its use at the time of the taking had continued excluding however any improvements that were or are thereon.]

All sums of money received by the respective municipalities as compensation for loss of tax revenue pursuant to [paragraphs b. and c. of] *this section shall be applied to the same purposes as is the tax revenue from the assessment and collection of taxes on real property of the said municipalities, and to accomplish this end such sums shall be apportioned in the same manner as the general tax rate of the municipality for the tax year preceding the year of receipt.* [for all tax purposes the lands acquired for the said water supply system shall be deemed to be included in the ratables of the municipality to the same extent as though they had not been so acquired.]

Appendix D

The State shall be reimbursed for payments required to be made by this section [from the commencement of the actual construction of the water supply system] *out of the proceeds received for the sale of water supplied by said system.*

The State Treasurer shall also pay to any county or municipality the cost of relocating any municipal or county roads made necessary by reason of the acquisition or use of property pursuant to this act.

4. This act shall take effect immediately.

Approved and effective Dec. 26, 1957.

Laws 1958 Regular Session

Water Supply — Acquisition of Property

CHAPTER 57
SENATE NO. 189

An Act to amend "An act authorizing and directing the Commissioner of Conservation and Economic Development to acquire certain property in the name of the State for water supply and other public purposes and making an appropriation therefor," approved June 1, 1956 (P.L. 1956, c. 60).

Be it Enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 1 of the act of which this act is amendatory[57] is amended to read as follows:

1. The Commissioner of Conservation and Economic Development is authorized and directed to acquire, in the

[57] N.J.S.A. 58:20-1.

name of the State, [within 2 years from the effective date of this act] *on or before December 31, 1958,* such part of the area commonly known as Round Valley, located in Hunterdon county, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be either the Delaware river, exclusive of its tributaries, or the south branch of the Raritan river or both.

No water shall be pumped from the south branch of the Raritan river into a reservoir constructed in said area whenever the flow in said river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey Stream gauging station at Manville or less than 90 million gallons daily at the United States Geological Survey stream gauging station at Bound Brook, nor shall water be pumped from said river into such reservoir during the period from June 15 to September 15 in any year.

Whenever the flow of water in the south branch of the Raritan river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey stream gauging station at Manville, or less than 90 million gallons daily at the United States Geological Survey stream gauging station at Bound Brook, a sufficient amount of water shall be released from such reservoir or from such other reservoir or reservoirs as may be constructed on the south branch of the Raritan river or its tributaries in such amounts as will maintain not less than the said flows of 40 million gallons daily at Stanton and 70 million gallons daily at Manville and 90 million gallons daily at Bound Brook, and such released water shall be returned to the south branch of the Raritan

river at the point of diversion or pumping into such reservoir or at some point upstream thereof.

Upon the completion and placing in operation of such reservoir in the Round Valley area, not less than 830,000 gallons of water daily shall be released at all times into Prescott brook from such reservoir and at all times not less than 170,000 gallons of water daily shall be released into the south branch of the Rockaway creek from such reservoir.

2. This act shall take effect immediately.

Approved and effective June 12, 1958.

Introductory Statement

The extension of time, from June 6, 1958 to December 31, 1958, within which the Commissioner of the Department of Conservation and Economic Development is authorized and directed to acquire Round Valley becomes necessary to permit the acquisition of 5 small parcels of land necessary for reservoir purposes. The owners of these parcels could not be located notwithstanding extensive and diligent efforts to do so and condemnation has become necessary. The acquisition of all other land has been completed.

APPENDIX E

Various Constitutional Provisions

ART. I, SEC. 10, *United States Constitution*

No State Shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

AMENDMENT V, *United States Constitution*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ART. XIV, SEC. 1, *United States Constitution*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

Art. VII, Sec. II, Par. 2, *New Jersey Constitution*, 1947

No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year; except that when a change in the fiscal year is made, necessary provision may be made to effect the transition. No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor.

Art. VIII, Sec. II, Par. 3, *New Jersey Constitution*, 1947

The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. No such law shall take effect until it shall

have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 560

SILVIO A. LANZA and VITO F. LANZA,

Appellants,

vs.

STATE OF NEW JERSEY, BY SALVATORE A. BONTEMPO, Commissioner of Conservation and Economic Development,

Appellee.

On Appeal from New Jersey Supreme Court

MOTION TO DISMISS

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Appellee,
State House Annex,
Trenton, New Jersey.

BERNARD HELLRING,
Special Counsel,
1180 Raymond Boulevard,
Newark 2, New Jersey.

PHILIP LINDEMAN, II,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE CASE	1
ARGUMENT:	
Point I—Appellants are barred from raising questions cognizable in a writ of certiorari	2
Point II—This Court should not review issues that it had declined to review on a previous appeal	3
Point III—Appellants have not shown any vested right to have been violated by the Round Valley Act	6
Pont IV—The refusal on procedural grounds to allow Vito Lanza to intervene raises no substantial federal question	11
CONCLUSION	11

Cases Cited

Board v. Pursifull, 38 N. E. 2d 246 (Sup. Ct. Ind., 1941)	10
Campbell v. Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885)	9
Chase Securities v. Donaldson, 325 U. S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945)	8, 9
Coombs v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1931)	7
Devou, Executor v. Cincinnati Covington and Erlanger Ry. Co., mem. dec. 220 U. S. 605, 31 S. Ct. 118, 55 L. Ed. 605 (1911)	8

PAGE

Dohany v. Rogers, 281 U. S. 862, 50 S. Ct. 299, 74 L. Ed. 904 (1930) 8

Erie R.R. Co. v. Bd. of Public Utilities Commission of New Jersey, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921) 6

Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773 (1913) 7

Kersten v. U. S., 161 F. 2d 337 (10th Cir., 1947), cert. den., 331 U. S. 851, 67 S. Ct. 1727, 91 L. Ed. 1859 (1947) 9

Lanza v. New Jersey, 358 U. S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959), reh. den., 359 U. S. 932, 79 S. Ct. 606, 3 L. Ed. 2d 634 (1959) 1, 5

Maxwell v. Goetschius, 40 N. J. L. 383 (Sup. Ct., 1878) 7

Milk Control Board v. Pursifull, 219 Ind. 49, 36 N. E. 2d 850 (Sup. Ct., 1941) 9, 10

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 30 S. Ct. 461, 54 L. Ed. 727 (1910) 8

Nablett v. Carpenter, 305 U. S. 297, 59 S. Ct. 170, 89 L. Ed. 182 (1938) 6

Ohio v. Akron Metropolitan Park District, 281 U. S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930) 6

O'Neill v. Leamer, 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249 (1915) 6

Pennsylvania Greyhound Lines v. Rosenthal, 14 N. J. 372, 102 A. 2d 587 (1954) 7

Roe v. Kansas Ex Rel. Smith, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259 (1929) 8

PAGE

State v. Lanza, 27 N. J. 516, 143 A. 2d 571 (1958).... 3, 5

State v. Lanza, 39 N. J. 595, 190 A. 2d 374 (1963), filed April 23, 1963, application for rehearing denied, May 27, 1963..... 1

State by Parsons v. Standard Oil Co., 5 N. J. 281, 74 A. 2d 565 (1950)..... 8

Welsh v. Swasey, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909)..... 6

United States Constitution Cited

Fourteenth Amendment 3-5, 8, 9

New Jersey Constitution Cited

1947—

Article VII, Section II, Paragraph 3 3

Paragraph 2 5

Statutes Cited

Emergency Price Control Act (1942)..... 9

L. 1956, c. 60 .....3, 4, 6

L. 1957, c. 215 3

L. 1958, c. 57 6

N.J.S.A. 50:20-1 3

N.J.S.A. 53:20-1 4

N.J.S.A. 58:20-1 (as amended) 3, 4

Round Valley Act 1, 3-6, 10

PAGE

28 U.S.C.:

Sec. 1257 (1) 2

Sec. 1257 (2), (3) 1, 2

Sec. 2101 (c) 2

Sec. 2103 2

Rules Cited

New Jersey Rules of Civil Practice:

R.R. 4:37-1 11

United States Supreme Court Rules:

16 1

22, 34, 50 2

Pursuant to Rule 16 of this court, appellee hereby moves to dismiss the within appeal on the grounds that it does not present a substantial federal question, that certain of the questions sought to be reviewed have previously expressly been passed on, and that the judgment below rests on an adequate non-federal basis.

Counter-Statement of the Case

On or about July 19, 1963, appellant filed a notice in this court purporting to be a notice of appeal under 28 U. S. C. §1257 (2) and (3). On September 17, 1963, by an order of the Chief Justice of the New Jersey Supreme Court, the time for docketing the case on appeal was extended to October 17, 1963.

The final determination of the New Jersey Supreme Court sought to be reviewed herein *State* v. *Lanza*, 39 N. J. 595, 190 A. 2d 374 (1963), was filed on April 23, 1963 and an application for rehearing was denied on May 27, 1963. Appellee has neither applied for, nor been granted any extensions of time by this Court within which to file a petition for certiorari.

As for the challenge to the validity of the Round Valley Act, appellants have shown that they appealed the trial court's determinations to the New Jersey appellate courts (Db6-9) but it is also significant that they appealed the same to this Court which dismissed the appeal for want of a substantial federal question. *Lanza* v. *New Jersey*, 358 U. S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959) reh. den. 359 U. S. 932, 79 S. Ct. 606, 3 L. Ed. 2d 634 (1959).

ARGUMENT

POINT I

Appellants are barred from raising questions cognizable in a writ of certiorari.

While the notice filed by appellants in this court on July 19, 1963 refers to 28 U. S. C. §1257 (3), the certiorari section, they have failed to file a petition for certiorari within 90 days of final judgment in the state court as required under 28 U. S. C. §2101 (c) and Rule 22 of this Court. An application had been made by them to the New Jersey Supreme Court for extension of time to docket their case on *appeal* (28 U. S. C. §1257 (2)) but they did not apply to a member of this Court for any extension of time to file the petition for certiorari, as required by Rule 22.

Thus, even assuming any merit in appellants' questions 2 through 8 (Db3, 4, 5), they all refer to claims of title, right, privilege, or immunity under the United States Constitution, and, as such, are cognizable only in a petition for writ of certiorari, which appellants have not filed as required by Rules 22, 34 and 50 of this court.

Appellee urges that these issues ought not to be treated as having been improvidently raised in an appeal, under 28 U. S. C. §2103, since appellants obviously were fully aware of their acts and should be bound by them. They chose to notify appellee that they were claiming review under *both* subsections 2 (direct appeal) and 3 (certiorari) of 28 U. S. C. §1257. Their election to proceed only under subsection 1 was deliberate, as evidenced not only by their specifying both routes of review, but also by their recourse to the approval of the state court in securing an extension of time, a course to be followed only in a direct appeal situation.

POINT II

This Court should not review issues that it had declined to review on a previous appeal.

In the notice of appeal to this court, filed by appellant Silvio Lanza on September 19, 1958 from the final determination of the New Jersey Supreme Court on the validity of the Round Valley Act, *State* v. *Lanza*, 27 N. J. 516, 143 A. 2d 564 (1958), appeal dismissed, 358 U. S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959), reh. den. 359 U. S. 932, 79 S. Ct. 606, 3 L. Ed. 2d 634 (1959), certain questions raised therein are raised again in this appeal. The questions raised in the instant appeal are virtually identical to the prior appeal as follows:

Questions in Instant Appeal	*Questions in Prior Appeal*
3. Does the determination by the New Jersey Supreme Court that the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 50:20-1 *et seq.* does not create a debt or liability of the State of New Jersey to certain municipalities and counties, as would require submission of the questions to voters as required by the New Jersey Constitution, 1947, Art. VII, Sec. II, par. 3, render the Act invalid as operating to deprive the appellants of their property without due process of law, and denying them the equal protection of law in contravention of the provisions of Amendment XIV of the United States Constitution?	3. Did the Legislature in enacting the Round Valley Act (C. 60 of the Laws of 1956 of the State of New Jersey; N.J.S.A. 58:20-1; as amended by Chapter 215 of the Laws of 1957); create a "debt" or "liability" of the State of New Jersey in contravention of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

Questions in Instant Appeal

4. Does the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.* operate to deprive the appellants of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution, in that the Act contains an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development?

5. Does the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.* operate to deprive the appellants of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution, in that the Governor of the State of New Jersey

Questions in Prior Appeal

4. Is C. 60 of the Laws of 1956 of the State of New Jersey (N.J.S.A. 53:20-1); approved June 1st, 1956 repugnant to the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, in that the same involves an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development?

8. Did the Courts below err in precluding the Appellant; in contravention of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution; from demonstrating that the Commissioner of Conservation and Economic Development had delegated to others powers attempted to be conferred upon him by the Round Valley Act, supra?

9. Did the Legislature of the State of New Jersey appropriate funds for the purposes set forth in the Round Valley Act suprs. in violation of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, since it does not appear that the Gov-

did not certify as required by the Constitution of New Jersey, 1947, Art. VII, Sec. II, par. 2 that there were sufficient funds on hand and anticipated for the appropriation provided in the Act?

8. Were the appellants deprived of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution during the trial of the action by the following:

• • •

(d) The employment of special counsel to prosecute this action on behalf of the respondent.

ernor of the State of New Jersey had certified that there were sufficient funds on hand or anticipated for this improvement?

10. Was the employment of Special Counsel to prosecute this action on behalf of the Appellee, repugnant to the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

In *Lanza* v. *State*, 358 U. S. 33, 79 S. Ct. 341, 3 L. Ed. 2d 350 (1959), this court dismissed said prior appeal for want of a substantial federal question. Appellant does not make any argument nor cite any authority why this court should find otherwise in this appeal.

It is obvious, however, that, by their very nature, the questions are not reviewable by this Court. For example, questions #3 and #5 refer exclusively to an interpretation of the New Jersey Constitution which the New Jersey Supreme Court covered thoroughly. *State* v. *Lanza*, 27 N. J. 516, 143 A. 2d 571 (1958). If there is any factual basis for the argument that appellants were deprived of due process or were denied equal protection of the laws under the United States Constitution on these questions, they have not shown any evidence to that effect. Question #4, relating to the delegation of authority to the Commissioner of Conservation and Economic Development

is again exclusively a subject of State Law, having no Federal implications. cf. *Nablett* v. *Carpenter*, 305 U. S. 297, 59 S. Ct. 170, 89 L. Ed. 182 (1938); *Ohio* v. *Akron Metropolitan Park District*, 281 U. S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930); *Erie R.R. Co.* v. *Bd. of Public Utilities Commission of New Jersey*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921); *O'Neill* v. *Leamer*, 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249 (1915); *Welsh* v. *Swasey*, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909). Question #7 relating to the determination by the trial court as to the valuation of appellants' nursery stock is purely a fact question on which the Jurisdictional Statement of the appellants is totally silent except that the question is merely raised, but not argued or explained. Questions #8(a) (b) and (c) refer to procedural determinations of the trial court below upon which the appellants, again, make no argument whatever in their Jurisdictional Statement.

POINT III

Appellants have not shown any vested right to have been violated by the Round Valley Act.

The New Jersey Legislature passed a bill in May of 1958 extending the time of acquisition of all Round Valley properties until December 31, 1958. L. 1958, c. 57. The original bill, passed in 1956, L. 1956, c. 60, provided, in effect, that the acquisition be completed on or before June 1, 1958. The Governor of New Jersey signed the 1958 Act into law on or about June 12, 1958. On the basis of these bare facts, appellants now contend that the twelve day hiatus somehow conferred "vested rights" upon them which were inviolate.

Appellants argue at Db10-31 that it is "hornbook law that the legislature cannot, by a statute, divest vested property rights by validating past acts and proceedings". They ig-

nore the fact that all of the legal proceedings in condemnation duly instituted prior to June 1, 1958 were conducted under the aegis of a valid and subsisting law. Hence, there was no necessity for the legislature in extending the time of taking, to validate any past acts and proceedings (Db10-31). The past acts were valid in their own right and appellants do not challenge the same. In support their argument they cite a number of cases including *Pennsylvania Greyhound Lines* v. *Rosenthal*, 14 N. J. 372, 102 A. 2d 587 (1954). That case stands for the proposition that a law cannot create a remedy covering actions which took place prior to its adoption, if at the time of the happening of such acts no such remedy existed. It further held that while statutes are deemed to operate *in futuro*, nevertheless except where there is a clear indication of legislative intent to the contrary, a remedial and procedural statute is ordinarily applicable to procedural steps in pending actions. Appellants also cite *Maxwell* v. *Goetschius*, 40 N. J. L. 383 (Sup. Ct. 1878). In that case the legislature attempted to validate a former proceeding, wholly void under then existing law, which divested persons of real property. The court, in that case, held that the statute could not apply retrospectively to such a void sale. That case, therefore, is clearly distinguishable from the case at bar. In *Coombs* v. *Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1931), also cited by appellants, proceedings had been brought during the pendency of a State constitutional provision, which was held to have conferred contractual rights upon citizens of the State. When the constitutional provision was repealed, it was held that the proceedings could continue, because of the contractual right existing when the suit was instituted. There is nothing in that case relating to any "validating" of past acts and proceedings. *Ettor* v. *Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773 (1913), also cited by appellants, is similar to *Coombs* v. *Getz* and does not have any application in the case at bar.

The argument is further made that, after May 31, 1958, appellants were "entitled" to believe that Silvio's lands could no longer validly be taken under the pending proceedings (Db11-25). They do not cite any authority for this position nor do they point out that the highest court of New Jersey found to the contrary, holding that the New Jersey Legislature intended a retrospective effect to the statute (assuming the same to have been required) as to this remedial aspect. This Court ought not to review that determination of the New Jersey Supreme Court which construed and interpreted its own laws. *Dohany* v. *Rogers*, 281 U. S. 862, 50 S. Ct. 299, 74 L. Ed. 904 (1930); *Roe* v. *Kansas Ex Rel. Smith*, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259 (1929); *Missouri P. R. Co.* v. *Nebraska*, 217 U. S. 196, 30 S. Ct. 461, 54 L. Ed. 727 (1910); *Devou, Executor* v. *Cincinnati Covington and Erlanger Ry. Co.*, mem. dec. 220 U. S. 605, 31 S. Ct. 118, 55 L. Ed. 605 (1911).

Appellants proceed to analogize their "vested property right" to a party's vested right where a statute of limitations had run. In support of this proposition they cite *State by Parsons* v. *Standard Oil Co.*, 5 N. J. 281, 74 A. 2d 565 (1950). That case held that a State cannot abrogate a vested property right created by a statute of limitations. In that case debts of the company in the form of certain choses in action were held not to be subject to escheat after a six year period of limitations expired. Under New Jersey law, the right to interpose the bar of the statute of limitations to actions in contract were vested property rights which no law making body could abrogate or impair. That court did observe, however, that a plea of the bar of the statute of limitations following the rule of *Chase Securities* v. *Donaldson*, 325 U. S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945) is good "only by legislative grace" and is not within the operation of the Fourteenth Amendment to the United States Constitution, which "does not make an Act

of State Legislation void merely because it has some retrospective operation". In *Chase Securities, supra*, at 325 U. S. 311, Mr. Justice JACKSON cited *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885) for the proposition that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment may repeal or extend a statute of limitations even after the right of action is barred thereby, restore to the Plaintiff his remedy, and divest the Defendant of the statutory bar.

The question of the effect of statutes of limitation, nevertheless has no application in this case. The lands to which the appellants claim title were subject to a condemnation suit at any time, whether before, during, or after the so-called twelve day hiatus period, provided the lands would have been needed for public use. Thus, there was no vested right in appellants which was immune from intrusion by any authority having the power of eminent domain.

In *Kersten* v. *U. S.*, 161 F. 2d 337 (10th Cir. 1947) it was held that a proceeding instituted before the amendment to the Emergency Price Control Act of 1942 was valid and subsisting after an amendment to the act was passed extending the life of that Act. The amendment was passed several weeks after the original Act expired by its terms, thus demonstrating a close similarity to the facts at bar. While that amendment expressly referred to violations under the original act, and operated to revive them, the question of the validity of such a concept was raised and the court approved it. This Court, it should be noted, refused to recognize a sufficiently substantial federal question and denied review by certiorari, 331 U. S. 851, 67 S. Ct. 1727, 91 L. Ed. 1859 (1947).

Appellants have not attempted to distinguish the *Kersten* case, nor did they discuss *Milk Control Board* v. *Pursifull*,

219 Ind. 49, 36 N. E. 2d 850 (Sup. Ct. 1941), which is analogous to the case at bar and which was cited in the opinion of the Appellate Division of the New Jersey Superior Court (D22a-10). In that case a milk control law expired by its own limitation on June 30, 1941. An amendment to the act extending it for two years was not enacted until July 8, 1941, over a month after the law had expired. An action had been instituted against the defendant under the expired statute and was pending at the date of expiration (see report of further proceedings in *Board* v. *Pursifull*, 38 N. E. 2d 246 (Sup. Ct. Ind. 1941)) and upon the expiration of that Original Act, the defendant moved to dismiss the proceedings. The Court denied the motion, holding that the intention of the Legislature was clearly to continue the operation of the act and extend it. It refused to permit the delay to "thwart the purpose and intention of the Legislature."

As for Appellants' argument (Db10-24) that the facts herein might have been far different if the extending amendment to the Round Valley Act had been adopted five months, one year or two years after the original Act had expired, the point is frivolous and speculative. Had any of these hypotheses come to pass, appellants would surely, even for their own protection, have been required to move in the original proceedings in the New Jersey Superior Court for an order dismissing the action and vacating the Notice of Lis Pendens filed by the State. Thus, appellants would not have been left without their proper remedy.

POINT IV

The refusal on procedural grounds to allow Vito Lanza to intervene raises no substantial federal question.

The opinion of the New Jersey Supreme Court (D3a to D6a) clearly describes the circumstances under which Vito Lanza sought to intervene. It was almost a year after this action was commenced that Vito purportedly "acquired" an interest in appellant Silvio's lands and thereupon attempted to intervene (D3a-3). Vito's effort to intervene fell under Revised Rule 4:37-1 *et seq.* of the New Jersey Rules of Civil Practice. Under the applicable practice rules of New Jersey, the Supreme Court of New Jersey found that Vito was properly excluded (D6a-15). He was never, therefore, a party in this suit, and all arguments of Appellants respecting denial of Counsel have no application in this proceeding.

CONCLUSION

For the foregoing reasons, appellee urges that the within appeal be dismissed.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Appellee.

BERNARD HELLRING,
Special Counsel.

PHILIP LINDEMAN II,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 869

SILVIO A. LANZA and VITO F. LANZA,
Appellants,

vs.

STATE OF NEW JERSEY, BY SALVATORE A. BONTEMPO,
Commissioner of Conservation and Economic Development,
Appellee.

On Appeal from New Jersey Supreme Court

APPELLANT'S REPLY STATEMENT

JACOB GREEN,
Counsel for Appellants,
11 Commerce Street,
Newark 2, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-6611-12

TABLE OF CONTENTS

	PAGE
APPELLANT'S REPLY STATEMENT	1-3
(1)	1
(2)	2

Cases Cited

Grays Harbor Logging Co. v. Coates-Fordney Co., 243 U. S. 251	2
Lanza v. State, 359 U. S. 33	2
Prudential Insurance Co. v. Cheek, 259 U. S. 530	1

Statutes Cited

L. 1956, c. 60 (Original Round Valley Act)	2
N.J.S.A. 58:20-1	2
28 U.S.C.:	
Sec. 1257(2), (3)	1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 560

SILVIO A. LANZA and VITO F. LANZA,

Appellants,

vs.

STATE OF NEW JERSEY, by Salvatore A. Bontempo, Commissioner of Conservation and Economic Development,

Appellee.

APPELLANT'S REPLY STATEMENT

(1)

The appellee's motion to dismiss asserts that appellants are barred from raising those questions cognizable in a Writ of Certiorari. It is true that the appellants have chosen to appeal; those issues which are non-appealable in and of themselves were raised in order that they may be considered along with the merits of the appealable issues. This is an acceptable manner of seeking review before this Court. See *Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 546. Appellants fail to understand the claim of the appellee, on page 2 of appellee's motion, that appellants have elected to proceed only under Subsection 1, inasmuch as the appeal is taken under Subsection 2 of 28 U. S. C. §1257 and reference to Subsection 3 of 28 U. S. C.

§1257 was simply as a frame of reference for those non-appealable grounds reviewable along with the merits of the appealable issues presented by this case.

(2)

The appellee argues that in *Lanza* v. *State*, 359 U. S. 33, this Court dismissed a prior appeal in this cause for want of a substantial Federal question. That appeal was brought during an intermediate stage of the proceedings. At the time the New Jersey Supreme Court had sustained the validity of the *original Round Valley Act* (L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.*). At the same time that the appellants were seeking a final determination on the validity and constitutionality of the *original Round Valley Act*, the matter was proceeding in the trial court toward factual review on the issue of value of the property. The prior appeal to this Court took place before the trial of the compensation aspect of the case. As such, the decision of the New Jersey Supreme Court was not a final judgment under applicable case law. *Grays Harbor Logging Co.* v. *Coates-Fordney Co.*, 243 U. S. 251. Moreover, the issues raised on this appeal concerning the expiration of the condemnation power during the pendency of the action and the effect upon the appellants' rights as a result thereof, were not part of the original appeal. These issues were not presented to the New Jersey Supreme Court, inasmuch as they had not as yet arisen at the time the case was before that Court at the intermediate stage referred to. In fact, the New Jersey Supreme Court subsequently denied appellants' request for certification from the dismissal by the Appellate Division of their appeal in which they sought a determination on the questions of the expiration of the condemnation power and the intervention of Vito Lanza, but the Court expressly stated in the denial that same was made "without prejudice to the renewal of the grounds sought * * * to be raised on appeal from final judgment". (See Appendix B, page

5a). The issues were properly raised at the trial level, and now for the first time are before this Court for review. The only questions which were before this Court originally were the questions on Page 16 of the Jurisdictional Statement and none of the other questions were or could have been raised before this Court on the prior appeal. This is the first time that this Court has had before it all of the issues in the case after a full trial on the merits with the resultant final determination by the trial court and appellate courts of the State of New Jersey on the questions raised.

Respectfully submitted,

JACOB GREEN,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 560

SILVIO A. LANZA and VITO F. LANZA,
Petitioners,

vs.

STATE OF NEW JERSEY, BY SALVATORE A. BONTEMPO, Commissioner of Conservation and Economic Development,
Appellee.

On Appeal from New Jersey Supreme Court

PETITION FOR REHEARING

JACOB GREEN,
Counsel for Petitioners,
11 Commerce Street,
Newark 2, New Jersey.

VITO F. LANZA,
On the Petition.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

In the

Supreme Court of the United States

October Term 1963

No. 560

Silvio A. Lanza and Vito F. Lanza,
Petitioners,

vs.

State of New Jersey, by Salvatore A. Bontempo, Commissioner of Conservation and Economic Development,
Appellee.

PETITION FOR REHEARING

Silvio A. Lanza and Vito F. Lanza pray that this Court grant rehearing of its Order of January 20, 1964, dismissing their appeal for want of jurisdiction and denying certiorari (after treating the papers whereon the appeal was taken as a petition for writ of certiorari) in spite of the fact that the notice of appeal was filed as a matter of right and predicated affirmatively on specific constitutional questions presented at the trial level and determined adversely against appellants in the asserted belief in the record that they had been previously determined by this Court when, in truth and in fact, these questions are now raised in this Court for the first time (D47a-22 to 32; D51a-30 to D52a-5; D79a-13 to 29; D159a to D174a-5; D176a-22

to 40; D179a-25 to 37; D811a-15 to D821a-15; D36a to D134a; D159a to D174a; D732a to D874a; D179a-4 to D180a-35) and respectfully request in accordance with the appeal providently taken as of right that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court in the above entitled case, as prayed for in the Jurisdictional Statement filed previously herein.

Passing on the motion to dismiss was accordingly premature and irregularly considered without a consideration of the record of appeal on the merits. An appellee may not in this manner direct a motion to dismiss which the rules of this Court themselves do not permit, even under the recent amendments effecting the changes. This was the very weakness the rules intended to protect.

As set forth in the Jurisdictional Statement, the appellants' lands contained an extensive plantation of nursery stock. To this stock the trial court affixed a so-called fair value of only $1,975.00. The appellant, Silvio A. Lanza, introduced credible and competent evidence that the value of his nursery stock was in excess of $250,000.00. It is evident that the award fails to give the appellants fair value for their property and further is confiscatory and constitutes a taking of their property without due process of law, in contravention of Amendment XIV to the United States Constitution. Further, the appellant, Vito F. Lanza, was denied his right to intervene in the cause, thereby depriving him of his basic Federal constitutional right that his property should not be taken or disposed of without a hearing. Moreover, there is the basic question of the termination of the condemnation power under the very statute granting that power during the pendency of the proceedings, and the retroactive construction given the statute by the New Jersey courts which impaired Silvio A. Lanza's vested right to deal with his property and deprived him and all persons interested therein of any appreciation in

the value of the property or of any increase in the value of the nursery stock subsequent to July 3, 1957.

The appellants believe that this Court may not have given due weight to the fact that this is the first time this Court has had before it all of the issues in the case, and that any prior determinations which may have been brought before this Court for review in a previous appeal by Silvio A. Lanza were not final judgments. As stated in appellants' Reply Statement, the issues concerning the expiration of the condemnation power during the pendency of the action and the effect on the appellants' rights as a result thereof, as well as the denial of Vito F. Lanza's right to intervention, and the *quantum* of the award, were never presented to this Court for review until the appeal in which this petition for rehearing is being made.

In view of this Court's acknowledged concern with the protection of basic property rights, as evidenced by the extension of its scope of review over the exercise of the condemnation power, the appellants find it hard to believe that this Court would deny them their right to review of the very substantial Federal questions which have been decided adversely to them in the courts of the State of New Jersey.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement and appellants' Reply Statement, it is respectfully urged that rehearing be granted, and that upon such rehearing a writ of certiorari issue to the Supreme Court of the State of New Jersey.

Respectfully submitted,

JACOB GREEN,
Counsel for Petitioners.

VITO F. LANZA.
On the Petition.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

JACOB GREEN,
Counsel for Petitioners.